U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANCES E. QUINTANA and AIR FORCE ACADEMY, Colorado Springs, CO

Docket No. 99-835; Submitted on the Record;
Issued November 8, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether appellant met her burden of proof to establish that she sustained an emotional condition in the performance of duty; (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.[1] On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or her frustration from not being permitted to work in a particular environment or to hold a particular position.[2]

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which she claims compensation was caused or adversely affected by employment factors.[3] This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.[4]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *See Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

[3] *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

[4] *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.[5] If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.[6]

In April 1995, appellant, then a 55-year-old accounting technician, filed an occupational disease claim alleging that, due to various incidents and conditions at work, she sustained several emotional and stress-related conditions including depression, anxiety, lesions, fever, visual blurring, pleurisy, arrhythmias, convulsive disorders, neuropathies, renal disease, hearing loss, rashes, loss of balance and swollen joints. By decision dated July 19, 1995, the Office denied appellant's emotional condition claim on the grounds that she did not establish any compensable employment factors. By decisions dated May 29 and September 20, 1996, and February 4 and October 14, 1998, the Office affirmed its prior decisions. By decision dated November 12, 1998, the Office denied appellant's request for merit review. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that she was subjected to harassment and discrimination by a supervisor, Barbara Ashcom. Appellant claimed that Ms. Ashcom repeatedly belittled her, unfairly criticized her work in the presence of others, prevented coworkers from helping her, retaliated against her for filing complaints and threatened to lower her grade level. She asserted that Ms. Ashcom made such statements as "you are dumb and stupid," "you do n[o]t have the intelligence of a GS-5," and "I should have selected someone else for the job instead of you." To the extent that disputes and incidents alleged as constituting harassment and discrimination by a supervisor are established as occurring and arising from appellant's performance of her regular duties, these could constitute employment factors.[7] However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.[8]

With respect to the comments appellant attributed to Ms. Ashcom, the record contains statements dated August 27, 1995 and March 30, 1998 in which a coworker, Darliene Gall, indicated that Ms. Ashcom made some comments to appellant which were similar to those alleged by appellant. Ms. Gall indicated that these comments were regularly made in front of

[5] *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

[6] *Id.*

[7] *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

[8] *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

other supervisors and coworkers, including Loida Anderson. However, the record contains a statement in which Ms. Anderson indicated that she never witnessed Ms. Ashcom treat appellant in an improper manner. Moreover, Ms. Ashcom denied making the alleged comments and the record contains statements from several supervisors and coworkers who worked closely with appellant and denied that Ms. Ashcom mistreated appellant. Moreover, the statements of Ms. Gall are lacking in adequate specificity as to the times and circumstances of the alleged comments. Therefore, appellant has not established that Ms. Ashcom made such abusive comments to her as alleged.

With regard to the other claimed improper actions by Ms. Ashcom, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that she was harassed or discriminated against by Ms. Ashcom in this regard.[9] Appellant submitted no corroborating evidence, such as witness statements, to establish that these other claimed incidents actually occurred.[10] Thus, appellant has not established a compensable employment factor under the Act with respect to the claimed harassment and discrimination.

Appellant alleged that the employing establishment engaged in improper disciplinary actions, issued unfair performance evaluations, improperly assigned work duties and unreasonably monitored her activities at work. The Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.[11] Although, the handling of disciplinary actions and evaluations, the assignment of work duties and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer and not duties of the employee.[12] However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.[13] Appellant did not submit evidence showing that the employing establishment committed error or abuse with respect to these matters. Thus, appellant has not established a compensable employment factor under the Act with respect to administrative matters.

Appellant suggested that she had difficulty performing her duties and was frustrated in her attempts to meet deadlines. The Board has held that emotional reactions to situations in which an employee is trying to meet her position requirements are compensable.[14] Appellant did

[9] *See Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

[10] *See William P. George*, 43 ECAB 1159, 1167 (1992).

[11] *See Janet I. Jones*, 47 ECAB 345, 347 (1996), *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

[12] *Id.*

[13] *See Richard J. Dube*, 42 ECAB 916, 920 (1991).

[14] *See Georgia F. Kennedy*, 35 ECAB 1151, 1155 (1984); *Joseph A. Antal*, 34 ECAB 608, 612 (1983).

not, however, describe her work duties in any detail or otherwise adequately articulate the nature of this claim; nor did she submit sufficient evidence in support thereof.

Appellant alleged that she was unfairly turned down for promotions between 1991 and 1994. The Board has previously held that denials by an employing establishment of a request for a different job, promotion or transfer are not compensable factors of employment under the Act, as they do not involve appellant's ability to perform her regular or specially assigned work duties, but rather constitute appellant's desire to work in a different position.[15] Appellant has not shown that the employing establishment committed error or abuse with respect to the promotion process. Thus, appellant has not established a compensable employment factor under the Act in this respect.

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met her burden of proof in establishing that she sustained an emotional condition in the performance of duty.[16]

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[17] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[18] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file her application for review within one year of the date of that decision.[19] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[20]

In connection with her October 16, 1998 reconsideration request, appellant submitted a letter in which she stated that she did not agree with the Office's findings. This statement is not relevant to the main issue of the case, *i.e.*, whether appellant submitted sufficient evidence to establish compensable employment factors. The Board has held that the submission of evidence,

[15] *Donald W. Bottles*, 40 ECAB 349, 353 (1988).

[16] As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; *see Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

[17] Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application." 5 U.S.C. § 8128(a).

[18] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[19] 20 C.F.R. § 10.138(b)(2).

[20] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

which does not address the particular issue involved does not constitute a basis for reopening a case.[21]

In the present case, appellant has not established that the Office abused its discretion in its October 12, 1998 decision by denying her request for a review on the merits of its prior decisions under section 8128(a) of the Act, because she has failed to show that the Office erroneously applied or interpreted a point of law, that she advanced a point of law or a fact not previously considered by the Office or that she submitted relevant and pertinent evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated November 12, October 14 and February 4, 1998 are hereby affirmed.

Dated, Washington, DC
November 8, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

[21] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).